United States

Department of Treasury

Director, Office of Professional Responsibility
Complainant – Appellee

v. Complaint No. 2005-13

Robert Alan Jones,
Respondent – Appellant

Initial Decision on Appeal

Under the authority of General Counsel Order No. 9 (January 19, 2001) and the authority vested in him as Assistant General Counsel of the Treasury who was the Chief Counsel of the Internal Revenue Service on August 9, 2007, Donald L. Korb delegated to the undersigned the authority to decide disciplinary appeals to the Secretary of the Treasury filed under Part 10 of Title 31, Code of Federal Regulations (Rev. 7-2002) ("Practice Before the Internal Revenue Service"), sometimes known and hereafter referred to as "Treasury Circular 230." This is such an appeal filed by Robert Alan Jones, an attorney authorized to practice law by the States of State 3 and State 2, and by State 4, who has for many years been authorized to practice before, and has in fact practiced before, the Internal Revenue Service.

1. Background

These proceedings began when, on July 5, 2005, Cono R. Namorato, then the Director, Office of Professional Responsibility, filed his Complaint in this matter alleging various violations of Treasury Circular 230 by Respondent – Appellant. The issues were joined when Respondent – Appellant filed his Answer on August 3, 2005. On August 12, 2005, this case was assigned to Administrative Law Judge Joseph Gontram of the National Labor Relations Board (the "ALJ" and "NLRB," respectively), sitting by designation under an interagency agreement between the NLRB and the Department of the Treasury. On September 6, 2005, Complainant-Appellee filed a Motion to Amend his Complaint, withdrawing certain charges and making minor, non-substantive amendments to other charges. After several delays to accommodate conflicts in the schedules of both parties, the hearing in this matter was held in Las Vegas,

NV on September 11th and 12th, 2006. During the first day of the hearing, Respondent–Appellant's counsel noted that Respondent-Appellant did not object to the proposed amendments to the Complaint, and the ALJ granted the Motion to Amend. The parties filed their proposed findings of fact and conclusions of law in this matter on November 13, 2006.

On January 16, 2007, the ALJ issued his Decision in this matter, which was served on the parties on January, 19, 2007.[1] On February 15, 2007, Respondent-Appellant timely filed his Appeal in this matter. On March 26, 2007, Complainant-Appellee timely filed by his Reply to Respondent-Appellant's Appeal.

As noted in the ALJ's Decision, the Director, Office of Professional Responsibility, charged, and the ALJ found, that Respondent-Appellant had violated Sections 10.22(a)(1), 10.22(a)(2), 10.22 (a)(3), 10.30(a), 10.51, 10.51(d) and 10.51(j) of Treasury Circular 230 (Rev. 7-2002), all such charges relating to: (i) Forms 2848 submitted to the Internal Revenue Service by Respondent-Appellant's principal business office and containing Respondent-Appellant's signature and the signatures of one or more of the following individuals, each of whom purported to be but was not an "Enrolled Agent:" Employee 4, Employee 1, Employee 2, and Employee 3; (ii) Forms 2848 prepared by Jones' office staff which Jones signed containing "cuttings and pastings" of taxpayers' signatures rather than the original taxpayers' signatures; and (iii) claims that some or all of the same individuals were "Enrolled Agents" contained in a website established by Respondent-Appellant or individuals under his direction and control. The pertinent specific provisions of Treasury Circular 230 that the Director, Office Professional Responsibility charged, and that the ALJ found, Respondent-Appellant to have violated are set forth at pages 1, 2 and 3 of the ALJ's Decision (Attachment A).

[1] The ALJ's decision in this matter appears as Attachment A and is incorporated herein in its entirety. Also attached as Attachment B is the Decision on Director, Office of Professional Responsibility c. Joseph R. Banister, Complaint No. 2003-02, a proceeding made public by mutual agreement of the parties. To the extent relevant to this matter, that Decision is also incorporated herein by reference.

1. Appellate Review of the ALJ's Decision Below

In reviewing the ALJ's Decisions, I have three responsibilities. First, given that the Complainant-Appellant seeks to suspend Respondent-Appellant from practice before the Internal Revenue Service for a period of 24 months, has Complainant-Appellee met each of the elements of his burdens of proof by "clear and convincing evidence," as required by Sections 10.76(a) of Treasury Circular 230 (Rev. 7-2002). Second, has Complainant-Appellant met this burden of proof with respect to each element of each specific charge? Third, has Complainant-Appellant met his burden of proof that Respondent-Appellant willfully violated any of the regulations contained in Treasury Circular 230, as required by Section 10.52(a) of Treasury Circular 230.[2]

In performing these functions, I do so keeping in mind the limited functions I perform as the Appellate Authority in these proceedings. Under Section 10.78 of Treasury Circular 230, I review all findings and conclusions of the ALJ under a "clearly erroneous" standard of review unless the issue is exclusively a matter of law. I review matters that are exclusively matters of law to the ALJ if I find that there are unresolved issues raised by the record as to which I feel the ALJ might elicit additional testimony or evidence. I find that remand authority to extend to giving the ALJ the chance to reconsider matters already in the record under applicable legal authorities not previously considered by the ALJ.

In performing my functions under the standards of review described above, having carefully reviewed the entire record, I find that, with the exceptions noted below where I either disagree with the ALJ or where I agree with the ALJ but as to which I there is a need for further explanation, there is ample evidence in the record to support the ALJ's determinations that Respondent-Appellant violated

[2] Only violations of Sections 10.33 and 10.34 (Neither of which are here in issue) can be established by the lesser standard of proof of reckless or grossly incompetent conduct. See Section 10.52(b) of Treasury Circular 230. The additional requirements of proof established by Section 10.52(a) are "sanction specific." If Complainant-Appellee had only sought to place a letter of reprimand in Respondent-Appellant's OPR file, he would not have to prove that Respondent-Appellant's conduct was "willful." However, in the case of public censures, suspensions and disbarments, Complainant-Appellee must also prove that a practitioner's conduct was "willful." With respect to conduct before July 26, 2002, Complainant-Appellee's burden to prove that charged conduct was willful" applied only in cases where the Director, Office Professional Responsibility sought to suspend or disbar a practitioner. See Section 10.52(a) of Treasury Circular 230 (Rev. 1994).

each of the provisions of Treasury Circular 230 (Rev. 7-2002) he was charged with having violated, and that the ALJ correctly determined that Complainant-Appellant has carried that burden with respect to each element of proof required to sustain each of the charges.

With regard to the charges pertaining to Respondent's purported violations of Section 10.51(j) of Treasury Circular 230 (Rev. 7-2002), I AFFIRM the ALJ's findings and determinations as they relate to Employee 1, Employee 2, and, for the reasons noted below, Employee 3, but REVERSE the charges, if any, that relate to Employee 4.

As to Employee 3, the ALJ noted that in statements made to Jones's clients, that was among those who would represent Jones's clients before the Internal Revenue Service. In light of those statements, the ALJ did not find credible Employee 3's testimony that her activities were limited to scheduling meetings and hearings. The ALJ further found that, even if Employee 3's activities were so limited, that still would constitute "practice before the Internal Revenue Service" as defined in Treasury Circular 230. Under my standards of review, I am not permitted to substitute my own judgment for that of the trier of fact on issues involving a witness' credibility when there is evidence in the record to support the determination of the ALJ. I find that such evidence exists in the record. Further, I agree with the ALJ that even such limited activities constitute "practice before the Internal Revenue Service" as defined by Treasury Circular 230. However inconvenient this may have proved for Respondent-Appellant and the members of his staff, there is a reason for this definition. The mere existence of an enforcement proceeding involving a taxpayer is within the ambit of the statutory protections established by Section 6103 of the Internal Revenue Code of 1986, as amended and in effect during the times in issue. Unauthorized disclosures of such information can subject Internal Revenue Service employees to potential civil and criminal penalties. In enacting Section 6103 and the sanctions applicable to IRS employees, it is Congress and the President, not the Internal Revenue Service, that can be said to have been "sticklers" when it came to the protection of taxpayer's privacy. For these reasons, I AFFIRM the ALJ's findings with respect to the Section 10.51(j) charges relating to Employee 3.

With respect to any Section 10.51(j) charges that relate to Employee 4, I REVERSE. Complainant-Appellant conceded during the hearing that Employee 4 was a C.P.A. and as such was authorized to practice before the Internal Revenue Service. Accordingly, Respondent-Appellee's conduct with respect to Employee 4 could not form the basis of a charge under Section 10.5(j).[3]

[3] For the same reason, Respondent-Appellant's conduct with respect to Employee 4 insofar as it is based upon purported unauthorized disclosures of tax return information to Employee 4, similarly could not form the basis for a charge under Section 10.51. The Section 10.51 charge was not addressed by the ALJ.

As the ALJ noted in his Decision (Attachment A), with the exception of the charges underlying the alleged violations of Sections 10.22(a)(1), 10.22(a)(2), 10.22(a)(3) and 10.30(a), each of the violations of Treasury Circular 230 with which Respondent-Appellant was charged required Complainant to prove by clear and convincing evidence that Respondent-Appellant's conduct was "knowing." In addition, under Section 10.52(a) of Treasury Circular 230, Complainant-Appellee must also prove by clear and convincing evidence that Respondent-Appellant's violations were willful. The ALJ did not address the latter issue in his Decision. These matters are discussed below.

3. Were Respondent's Violations "Knowing" and Willful?"

Treasury Circular 230 (Rev. 7-2002) provided no regulatory definition for the terms "knowing"[4] and "willful." Absent regulatory definitions for those terms, the strictest meanings one could ascribe to the terms are those developed by our Federal courts in interpreting like terms under Sections 7201 through 7207 of the Internal Revenue Code of 1986, as amended and in effect at the times in issue.[5] In the Decision on Appeal in Banister (Attachment B), I examined at length the relevant criminal tax and other Federal criminal precedents addressing the term "willful."

Perhaps the most frequently cited definition of "willful" appears in the Supreme Court's decision in Pomponio, which clarified for the lower courts what it intended in its earlier Bishop decisions. The Supreme Court noted that the term "willful" simply means "a voluntary, intentional violation of a known legal duty."

In most recent controlling precedent on this subject, in Cheek, the Supreme Court noted that the term "willful" required the Government to prove that: (i) the law imposed a duty on the defendant, (ii) the defendant knew of this duty, and (iii) the defendant voluntarily and intentionally violated that duty. The issue before the Court in Cheek examined issue (ii) in light of a jury instruction. The trial court had instructed the jury that "[a]n honest but unreasonable belief is not a defense and does not negate willfulness." The Supreme Court found that the instruction was incorrect insofar as a matter of interpretation of the Internal

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Consequently, I need not REVERSE on this point. The other charges pertaining to Employee 4 are not similarly defective.

[4] I note that the ALJ did not rise to the bait and adopt a "know, or have reason to know" standard, as he was urged to by Complainant-Appellee. That is not the standard set forth in Treasury Circular 230.

[5] I adopted these standards as the "law of the case" in this Appeal, though for the reasons stated in the Decision on Appeal In Banister Attachment B), there are reasons to believe that those standards may not be required to be met in this proceeding.

Revenue Code was concerned. Justice White, speaking for the Court, found that when it added the term "willful" to the criminal provisions of the Internal Revenue Code, Congress meant to overturn an irrebuttable common law presumption under which defendants were presumed to have knowledge of the law. Justice White noted, however, that the same did not hold true in determining whether the application of a statute to a defendant was constitutional. As to those matters, the common law presumption of knowledge of the law continued in effect. Justice White also noted that the question of a position's reasonableness could also affect a jury's view of whether a taxpayer's view of the Internal Revenue Code in fact was honestly held, as the taxpayer in Cheek (an airline pilot) found out when he was convicted on a different set of instructions on remand.

Here, Complainant-Appellee's charges against Respondent-Appellant do not involve interpretations of the Internal Revenue Code. The provisions Respondent-Appellant is charged with violating do not require knowledge of the detailed provisions of the Internal Revenue Code to sort out.[7] Moreover, the very Forms 2848 Respondent-Appellant signed reminded him of the "law" he is charged with violating. Moreover, as another court has noted, to the extent either "reasonableness" or the "honesty" of a belief remains an issue, both must relate to what the law is, not what the defendant believes the law should be.[8]

Given the ALJ's findings that Respondent-Appellant's conduct was "knowing," I have little doubt that he will also find Respondent-Appellant's conduct "willful" under these standards, and consequently under Section 10.52(a) of Treasury Circular 230 (Rev 7-2002). However, he has not yet done so, and it is not my function to make initial findings of fact or conclusions of law in these proceedings. Rather, it is my function to review the ALJ's findings of fact and conclusions of law under the standards of review set forth in Section 10.78 of Treasury Circular 230 (Rev. 7-2002). Accordingly, I VACATE AND REMAND each of the ALJ's findings and conclusions to the ALJ to permit him to enter findings with respect to the WILLFULNESS of Respondent-Appellant's conduct under each charge

4. Respondent's Additional Objections and Exceptions on Appeal

I find each of Respondent's additional objections and exceptions to be without Merit.

With respect to the first such objections or exception, I note that the Internal Revenue Service is not required to engage in a rulemaking proceeding every time it wishes to change the contents of a form, particularly in instances when the new form merely clarifies the requirement of a longstanding regulation.

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[7] Even if they did, a person with the work experience of Respondent-Applicant would stand on a very different footing than the taxpayer in Cheek.

[8] See the discussion of the Willie case in Banister (Attachment B).

I have been a tax lawyer or tax consultant for more than 36 years. Of that 36 years, more than 26 years have been spent in the private sector and more than 9 years have been spent in Federal service [in either my present position (from October 2002 to date) or as Assistant to the Commissioner of Internal Revenue (from November of 1977 through January of 1981)]. From 1971 until very recently, a person was authorized to generally represent taxpayers before the Internal Revenue Service only if the person was: (i) an attorney authorized to practice as such under the law of some state or the District of Columbia; (ii) a Certified Public Accountant, similarly authorized to practice as such under the laws of a State or the District of Columbia; (iii) Enrolled Agent; or (iv) within their area of special expertise, an Enrolled Actuary. Moreover a person could become an Enrolled Agent in only one of two ways, First, a person could become an Enrolled Agent by taking and passing an examination administered by the Office of Professional Responsibility. Second, a Person could become an Enrolled Agent by applying to the Office of Professional Responsibility for status as an Enrolled Agent on the basis of his or her experience gained during prior employment by the Internal Revenue Service. Public accountants were not admitted on the basis of their status as such under State law or because they were members of professional societies. The Office of Professional Responsibility (or its predecessor office, the Office of the Director of Practice) found the tests administered by the States or professional societies to Public Accountants to be of uneven quality and not a reliable basis for determining competency. More recently, having reviewed the qualification procedures for Public Accountants in some States, the Office of Professional Responsibility has found the qualification procedures in those states to be adequate to ensure the competency of practitioners, and has allowed Public Accountants in those states to practice as Enrolled Agents without taking and passing the examination administered by the Office of Professional Responsibility. During the years here in issue, neither State 2 not State 1 were among the States whose Public Accountants competency procedures had been accepted for these purposes. The Office of Professional Responsibility (and before, the Director of Practice) has never accepted membership in a professional society as a basis for according Public Accountants Enrolled Agent status. This objection or exception is without merit.

As to Respondent-Appellant's second additional objection or exception, that issue has been addressed above (in the context of the Section 10.51(j) charges). This objection or exception is without merit.

As to the Respondent-Appellant's third additional objection or exception, I find the objection/exception to be irrelevant and without merit.

WHEREFORE, I VACATE AND REMAND, to the ALJ his Decision to permit him to enter findings of fact and conclusions of law with respect to the WILLFULNESS of Respondent-Appellant's conduct.

This Initial Decision of Appeal DOES NOT CONSTITUTE FINAL AGENCY ACTION in this mater.

David F.P. O'Connor
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Office of Chief Counsel
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(As Authorized Delegate of Henry Paulson, Secretary of the Treasury)

October 12, 2007